



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

IN THE MATTER OF CLAIM AGAINST THE
DEALER BOND OF EWALD'S MAYFAIR
CHRYSLER-PLYMOUTH JEEP EAGLE, INC.

Case No. TR-01-0028

FINAL DECISION

Mr. Edward Kashishian filed a claim on or about June 26, 2000, with the Wisconsin Department of Transportation (the "Department") against the motor vehicle dealer bond of Ewald's Mayfair Chrysler-Plymouth Jeep Eagle, Inc. (the "Dealer"). On May 29, 2001, the claim, along with the documents gathered by the Department in its investigation, was referred to the Division of Hearings and Appeals for hearing. The undersigned gave the parties until July 11, 2001, to file any additional information they wished to have considered in issuing a preliminary determination in the matter. The Dealer submitted a letter and material dated July 2, 2001. Mr. Kashishian submitted a letter dated July 5, 2001.

On August 7, 2001, the undersigned issued a Preliminary Determination and informed the parties by letter addressed as shown below that if no timely objection to the Preliminary Determination were received by September 6, 2001, then the Preliminary Determination would be subject to adoption as the Final Decision in the matter. The undersigned has not received any objections to the Preliminary Determination. Accordingly, the Preliminary Determination is adopted as the final decision of the Department of Transportation pursuant to Wis. Adm. Code § Trans 140.26(5)(d).

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the parties to this proceeding are certified as follows:

The parties to this proceeding are certified as follows:

Mr. Edward Kashishian
1363 Chesterwood Lane
Pewaukee, WI 53071

Capitol Indemnity Corporation
P.O. Box 5900
Madison, WI 53705-0900

Ewald's Mayfair Chrysler-Plymouth Jeep
Eagle, Inc.
2201 N. Mayfair Road
Milwaukee, WI 53705-0900

FINDINGS OF FACT

1. Ewald's Mayfair Chrysler-Plymouth Jeep Eagle, Inc. (the "Dealer") is a motor vehicle dealer licensed by the Department pursuant to Wis. Stat. § 218.0111 (1999-2000). The Dealer's facilities are located at 2201 N. Mayfair Road in Wauwatosa, Wisconsin.
2. The Dealer has had surety bond number LP579291A, issued by Capitol Indemnity Corporation, continuously in force since January 1, 1994. A separate bond is renewed annually for calendar year periods, with a separate face amount of the bond applying each calendar year.
3. On September 2, 1998, Kashishian and the Dealer entered into a contract of sale for a 1989 Chrysler TC by Maserati, VIN ZC2FP110XKB201531 (the "Vehicle"), from the Dealer at the retail price of \$14,990.00, plus taxes and fees. The contract reflected the Vehicle being sold "As Is", with no express or implied warranties. The Vehicle is a hardtop/soft-top convertible.
4. The Vehicle was manufactured in Italy. Approximately only 2000 models were manufactured in the 1989 model year, and fewer than 8,000 models were manufactured altogether for model years 1989 to 1991. Kashishian understood that this model vehicle was relatively rare and that it had been out of production for quite some time.
5. Before entering into the contract of sale, Kashishian asked the salesperson whether there would be difficulty in getting parts for the Vehicle, and he was advised that parts would be available through the Dealer. Kashishian also asked whether the roof leaked and was told that it did not.
6. Kashishian took delivery of the Vehicle two days after entering into the contract of sale, on September 4, 1998. That same day, before delivering the Vehicle, the Dealer performed a "Used Vehicle Safety Inspection" on the Vehicle. After completing the inspection and making repairs to the power seats, the Dealer delivered the Vehicle to Kashishian. No problem with leaking of the roof was identified in the inspection.
7. The prior owner of the Vehicle had had the Vehicle serviced at the Dealer for problems with the seals between the hardtop and the windshield. The extent of this problem reported by the prior owner is not evident in the information provided, nor whether the problem was resolved.
8. The Dealer did not prepare a "Wisconsin Buyers Guide" for the Vehicle, either before or after the parties entered into the contract of sale on September 2, 1998. If the Dealer had duly prepared a Buyers Guide, the Dealer would not have been required to disclose that the prior owner had caused service to be done respecting the seals between the hardtop and the windshield.
9. On October 16, 1998, about six weeks after taking delivery and after having driven the Vehicle over 3,000 miles, Kashishian brought the Vehicle to the Dealer to be serviced, complaining that there were water leaks, air leaks, and wind noise at the corners of the roof around the "hooks". The Dealer made adjustments to the convertible hardtop to address the problem.

10. The leak problem was not resolved and ten days later, on October 26, 1998, Kashishian again took the Vehicle to the Dealer for attention to the problem. The Dealer again made adjustments to the convertible hardtop. Kashishian did not thereafter seek further corrective action or report any leaks at the hooks.
11. On December 4, 1999, the Vehicle was hit from behind in a collision that caused the hardtop and windshield to become misaligned. The collision caused a significant breach along the length of the seam between the windshield and hardtop, allowing wind and the elements to enter along the entire front edge of the hardtop.
12. The collision damage to the Vehicle was being repaired at the Dealer. An insurance company did not authorize repairs for the misalignment between the hardtop and the windshield because the insurance company mistakenly perceived this not to have been caused by the collision but rather to be the same leaking problem reported in October 1998.
13. Kashishian had placed approximately 30,000 miles on the Vehicle in the some 15 months between the purchase and the accident in December 1999.
14. Kashishian filed a dealer complaint on January 29, 2000, requesting that the leaking across the front of the roof and at the corner hooks be repaired.
15. On or about June 26, 2000, Kashishian filed a claim against the bond of the Dealer claiming that he was falsely informed that the roof did not leak and that parts for the Vehicle could be obtained. Kashishian sought to rescind the sale and requested compensation for his entire cost of obtaining the Vehicle, to include interest expense on his loan, of \$17,000.00.
16. The leaking across the front edge of the roof was caused by the collision on December 4, 1999. No act of the Dealer is asserted that would form the basis of a claim against the Dealer for any repairs necessary to correct the leaking that was caused by the collision.
17. The water leaks, air leaks, and wind noise at the corners of the roof that Kashishian reported in October 1998 were slight, and did not affect the safe operation of the Vehicle. Kashishian safely operated the Vehicle for some fifteen months and some 30,000 miles before he was hit from behind in the accident. There is insufficient evidence that at the time of the sale there was any perceptible leakage. There is insufficient evidence to establish that the salesman knowingly misrepresented to Kashishian that the roof did not leak.
18. If the Dealer had duly performed a used vehicle inspection before the contract of sale was signed with a view to preparation of a Wisconsin Buyers Guide, the Dealer in the exercise of reasonable diligence would not have identified any leak in the roof that constituted a significant existing mechanical defect. Thus, no notation regarding any existing roof leak would have been required to have been made on the Buyers Guide.
19. The salesman's representation to Kashishian that parts for the Vehicle would be obtainable was reasonably accurate and was not a false representation of an existing fact.
20. Kashishian's claim arose on September 2, 1998, the day he entered into the contract of sale for the Vehicle. The bond claim was filed within three years of the December 31, 1998, which was the ending date of the one-year period of the bond that was in effect at the time the claim arose.

21. No act of the Dealer that would be grounds for revocation or suspension of its motor vehicle dealer license caused any actual loss to Kashishian.

DISCUSSION

The procedure for determining claims against dealer bonds is set forth in the Wisconsin Administrative Code at Chapter Trans 140, Subchapter II. Section Trans 140.21(1) provides in relevant part as follows:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01(3)(a)1. to 14., 18. to 21., 25. or 27. to 31., Stats. *[recodified as §§ 218.0116(1)(a) to (gm), (im) to (k), (m), and (n) to (p) in Wis. Stats. (1999-2000)]*.

* * * *

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow a claim, a finding must be made that the Dealer violated one of the sections of Wis. Stat. § 218.0116(1) identified in Wis. Admin. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed.

By not preparing a Wisconsin Buyers Guide on the Vehicle, the Dealer violated Wis. Admin. Code § Trans 139.04(4) and (6), which provide in part as follows:

(4) USED MOTOR VEHICLE GENERAL CONDITION DISCLOSURE. Dealer and salespersons shall inform prospective retail purchasers of used motor vehicles in writing before purchase contract execution, in the manner and on the form prescribed in sub. (6). This disclosure shall include all significant existing mechanical, electrical and electronic defects and damage.... Disclosure of information shall be that which the licensee can find using reasonable care.

* * * *

(6) WISCONSIN BUYERS GUIDE. (a) Except as provided in par. (c), each used motor vehicle displayed or offered for sale by a dealer shall display a guide as prescribed by the department. The guide shall be prepared by an authorized employee of either the dealer, another dealer

having the same majority ownership as the dealer, or a predecessor dealer at the same location as the dealer. The guide shall be completed in duplicate and contain the printed names of the vehicle inspector and the records inspector. The original guide shall be signed by the dealer or a salesperson prior to separating the copy for display. The copy shall be displayed within the vehicle, attached to a window except where not possible, and shall be readable from the outside, or attached to motor driven cycles, and it shall become the possession of the purchaser upon delivery. The original shall be signed by the purchaser prior to delivery of the motor vehicle and shall be retained by the dealer for 5 years. ...

This violation of § Trans 139.04(4) & (6) constitutes a violation of Wis. Stat. § 218.0116(1)(gm), which provides that a motor vehicle dealer license may be revoked or suspended for failure to comply with any law relating to the sale of a motor vehicle. A violation of Wis. Stat. § 218.0116(1)(gm) will support a claim against a dealer bond pursuant to Wis. Admin. Code § Trans 140.21(1)(c)1, if the violation resulted in an actual loss.

There is insufficient evidence that the roof leaked at the time of the sale, or that if there was a leak, that the Dealer could have found it in the exercise of reasonable care in conducting a used vehicle inspection. Thus, even if the Dealer had duly prepared and displayed the Wisconsin Buyers Guide on the Vehicle before Kashishian signed the contract, the Dealer would not have been required to state therein that the roof had a leak. Moreover, the Dealer would not have been required to report therein that the former owner had had service done on the Vehicle for a problem with the seals between the roof and windshield. There is no evidence that such service was not completed satisfactorily at the time, or that if a leaking problem persisted that it was anything but a minor leak and did not affect the safe operation of the Vehicle. Any such existing leak would not have been a “significant existing mechanical ... defect” and thus would not have been required to have been reported on the Buyers Guide. Wis. Admin. Code § Trans 139.04(4). Accordingly, Kashishian suffered no actual harm from the Dealer’s failure to prepare the Buyers Guide.

Wisconsin Admin. Code § Trans 139.03(1) provides as follows:

The use of false, deceptive or misleading advertising or representations by any licensee to induce the purchase of a motor vehicle constitutes an unfair practice and is prohibited.

There is insufficient evidence that the salesman’s representation to Kashishian that the roof did not leak was false or deceptive when made. The mere fact that the Dealer had performed repairs to the seals for the hardtop for the previous owner does not establish that there were any leaks on the roof that were discoverable in the exercise of reasonable care at the time of the sale. Accordingly, a violation of § Trans 139.03(1) has not been established respecting the salesman’s representation regarding the roof.

Similarly, the salesman’s representation that parts would be available through the Dealer was reasonably accurate and was not a false representation of an existing fact. Though Kashishian points out that it was necessary to get a replacement rear bumper from salvage in connection with the collision repairs, the overwhelming weight of the evidence is that parts generally have been obtainable and in fact have been obtained.

In sum, the only act of the Dealer for which the Dealer's motor vehicle dealer license could be suspended or revoked was the Dealer's failure to prepare and display the Wisconsin Buyers Guide. This violation, however, did not result in an actual loss to Kashishian, so his claim against the dealer bond must be denied.

CONCLUSIONS OF LAW

1. Mr. Edward Kashishian's claim arose on or about September 2, 1998, when he entered into a contract of sale for the Vehicle. The surety bond issued to the Dealer by Capitol Indemnity Corporation for the period January 1, 1998 to December 31, 1998 was then in effect.
2. Mr. Kashishian filed a claim against the motor vehicle dealer bond of the Dealer on or about June 26, 2000. The bond claim was filed within three years of December 31, 1998, which was the last day of the one-year period covered by the surety bond. The claim is timely filed pursuant to Wis. Adm. Code § Trans 140.21(1)(d).
3. The Dealer violated Wis. Admin. Code § Trans 139.04(4) by not preparing or displaying a Wisconsin Buyers Guide regarding the Vehicle. This violation in turn constitutes a violation of Wis. Stat. § 218.0116(1)(bm) which provides that a dealer's failure to comply with a rule of the Department constitutes a basis to suspend or revoke a motor vehicle dealer license. Under Wis. Admin. Code § Trans 140.21(1)(c)1, this violation will support a claim against a dealer bond if it resulted in an actual loss to Kashishian.
4. The violation of Wis. Admin. Code § Trans 139.04(4) did not result in an actual loss to Kashishian, so Kashishian's claim against the bond based on this violation must be denied.
5. The Dealer did not engage in any other act that would be the basis for a claim against a dealer bond under Wis. Admin. Code § Trans 140.21(1)(c)1.
6. The Division of Hearings and Appeals has authority to issue the following order.

ORDER

The claim filed by Mr. Edward Kashishian against the motor vehicle dealer bond of Ewald's Mayfair Chrysler-Plymouth Jeep Eagle, Inc. is DENIED.

Dated at Milwaukee, Wisconsin on September ___, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____

William S. Coleman, Jr.
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of secs. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.